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IN THE

Supreme Court of the United States

October Term, 1953

No.

EDWARD VALVES, INC., *Petitioner*,

v.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT

To the Honorable The Chief Justice and The Associate Justices of the Supreme Court of the United States:

The above-named petitioner by its attorneys prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in the above-entitled cause.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on October 7, 1953, (R. 79). A petition for rehearing was timely filed on October 21,

1953, (R. 81), and was denied on November 6, 1953, (R. 91). The opinion of the Court of Appeals (R. 71-78) is reported in 207 F. (2d) 329. The jurisdiction of this Court is invoked under Section 1254(1) of Title 28, U.S.C.

STATUTES INVOLVED

The pertinent provisions of the Second Renegotiation Act, Title VII, Revenue Act of 1943, 58 Stat. 78, Act of February 25, 1944, (50 U.S.C. App. 1191) are as follows:

"Sec. 403. * * *

* * * * *

"(c)(1) Whenever, in the opinion of the Board, the amounts received or accrued under contracts with the Departments and subcontracts may reflect excessive profits, the Board shall give to the contractor or subcontractor, as the case may be, reasonable notice of the time and place of a conference to be held with respect thereto. The mailing of such notice by registered mail to the contractor or subcontractor shall constitute the commencement of the renegotiation proceeding. At the conference, which may be adjourned from time to time, the Board shall endeavor to make a final or other agreement with the contractor or subcontractor with respect to the elimination of excessive profits received or accrued, and with respect to such other matters relating thereto as the Board deems advisable. Any such agreement, if made, may, with the consent of the contractor or subcontractor, also include provisions with respect to the elimination of excessive profits likely to be received or accrued. If the Board does not make an agreement with respect to the elimination of excessive profits received or accrued, it shall issue and enter an order determining the amount, if any, of such excessive profits, and forthwith give notice thereof by registered mail to the contractor or subcontractor. In the absence of the filing of a petition with The Tax Court of the United States under the provisions of and within the time limit prescribed in subsection (e)(1), such order shall be final and conclusive and shall not be subject to review or redetermination by any court or other agency. * * *

* * * * *

"(3) No proceeding to determine the amount of excessive profits shall be commenced more than one year after the close of the fiscal year in which such excessive profits were received or accrued, or more than one year after the statement required under paragraph (5) is filed with the Board, whichever is the later, and if such proceeding is not so commenced, then upon the expiration of one year following the close of such fiscal year, or one year following the date upon which such statement is so filed, whichever is the later, all liabilities of the contractor or subcontractor for excessive profits received or accrued during such fiscal year shall thereupon be discharged. If an agreement or order determining the amount of excessive profits is not made within one year following the commencement of the renegotiation proceeding, then upon the expiration of such one year all liabilities of the contractor or subcontractor for excessive profits with respect to which such proceeding was commenced shall thereupon be discharged, except that (A) if an order is made within such one year by the Secretary (or an officer or agency designated by the Secretary) pursuant to a delegation of authority under subsection (d)(4), such one-year limitation shall not apply to review of such order by the Board, and (B) such one-year period may be extended by mutual agreement.

* * * * *

"(e)(1) Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c)(1), file a petition with The Tax Court of The United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before The Tax

Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. For the purposes of this subsection the court shall have the same powers and duties, insofar as applicable, in respect of the contractor, the subcontractor, the Board and the Secretary, and in respect of the attendance of witnesses and the production of papers, notice of hearings, hearings before divisions, review by The Tax Court of decisions of divisions, stenographic reporting, and reports of proceedings, as such court has under Sections 1110, 1111, 1113, 1114, 1115(a), 1116, 1117(a), 1118, 1120, and 1121 of the Internal Revenue Code in the case of a proceeding to redetermine a deficiency. * * * ."

SUMMARY STATEMENT OF THE MATTER INVOLVED

Renegotiation proceedings for the fiscal year ending December 31, 1943, of Edward Valves, Inc., petitioner herein, were commenced by formal notice on May 5, 1945. (R. 34, 35). On March 21, 1946, petitioner received by registered mail a notice and a unilateral determination issued on March 19, 1946, by the Maritime Commission making an initial determination of alleged excessive profits from contracts or subcontracts for the year 1943 in an amount of $1,286,000. (R. 13-15)

On May 1, 1946, petitioner filed with the War Contracts Price Adjustment Board a written request for review of the unilateral determination of the Maritime Commission for petitioner's fiscal year 1943. (R. 35-39)

On July 8, 1946, the War Contracts Price Adjustment Board sent by registered mail to petitioner a letter stating as follows: (Exhibit 4—Answer; R. 40)

> "The War Contracts Price Adjustment Board has considered your request that it review the above-mentioned unilateral determination and has decided not to initiate such a review. Accordingly, there is enclosed herewith the formal notice advising you that this unilateral determination is deemed the determination of the War Contracts Price Adjustment Board."

The formal notice referred to was dated July 8, 1946, and states as follows: (Exhibit E—Complaint; R. 16, 17)

> "You are hereby notified that, no review having been initiated by the War Contracts Price Adjustment Board, either on your request or on its own motion, of the order dated, issued and entered on 19 March 1946 pursuant to renegotiation under the Renegotiation Act, by:
>
> "Edward Macauley, Acting Chairman, United States Maritime Commission, acting on behalf of the War Contracts Price Adjustment Board in accordance with authority delegated by it, determining that of your profits derived from contracts and subcontracts subject to renegotiation under the Renegotiation Act for your fiscal year ended December 31, 1943, $1,286,000.00 represents excessive profits which should be eliminated, such order is deemed the determination of the War Contracts Price Adjustment Board.
>
> "A copy of such order is enclosed herewith.
>
> "This notice is being mailed to you by registered mail on 8 July 1946.
>
> "Demand is hereby made for the payment of the amount of such excessive profits to be eliminated less the tax credit, if any, referred to in such order. Any check should be drawn to the order of the Treasurer of the United States and delivered to the Director of Finance, United States Maritime Commission, Department of Commerce Building, Washington 25, D. C.
>
> "Interest will accrue at the rate of 6% per annum from and after 23 July 1946 on any amount due under such order and unpaid."

Petitioner's tax credit for the fiscal year ended December 31, 1943. was determined to be $1,028,800 and after applying such credit the net amount demanded as a result of the foregoing was $257,200. (Complaint—Para. 11; R. 7)

The one-year period after commencement as provided in Section 403(c)(3) for the completion of a renegotiation proceeding had at no time been extended by mutual agreement. (Answer—Para. 18; R. 28)

On October 29, 1949, the United States filed an action under the applicable Renegotiation Acts for the collection of unilateral orders of the War Contracts Price Adjustment Board determining alleged excessive profits of defendant, petitioner herein, for the fiscal years ended December 31, 1942, 1943, 1944 and 1945, and for interest thereon at the rate of 6% per annum. The unilateral orders for the years 1942, 1944 and 1945 are now pending in The Tax Court of the United States on petitions for redetermination. For the year 1943, no petition was filed in The Tax Court.

As to the year 1943, petitioner, in its answer, raised the affirmative defense that all liabilities, if any, of petitioner for that year had been fully discharged by operation of law—specifically Section 403(c)(3) of the Renegotiation Act of 1943 as above-quoted. (R. 27-30)

The United States moved for summary judgment on all counts; defendant filed a cross motion for summary judgment on Count II (involving the year 1943). The District Court allowed the Government's motion on all counts as to principal and fixed the rate of interest at 4% to the date of judgment. The court held that defendant was precluded from raising the defense of extinguishment of liability in the District Court action. (R. 56-57)

The defendant appealed from the judgment in respect of the principal amount of $257,200 under Count II, relating to the year 1943.

The Court of Appeals for the Seventh Circuit affirmed the judgment of the District Court, holding that by its failure to file a petition in The Tax Court for redetermination of its liability for that year petitioner was precluded by law from presenting in the District Court a defense of the discharge of liability as to excessive profits for 1943. (R. 76-77) In order to point out the conflict of such a holding with the position taken by the Court of Appeals for the Second Circuit in a similar situation, and in order to point out the constitutional questions that would be engendered by the Court's application of the statute, petitioner filed a

Petition for Rehearing in the Court of Appeals on October 21, 1953. (R. 83-85) That petition was denied on November 6, 1953. (R. 91)

QUESTIONS PRESENTED

Whether the defendant was precluded by the Renegotiation Act from presenting in the District Court a legal defense of the discharge of liability under Section 403(c)(3) of the Renegotiation Act as to alleged excessive profits in respect of the year 1943 because of its failure to file a petition in The Tax Court for redetermination of its liability for that year.

REASONS FOR GRANTING THE WRIT AND ARGUMENT RELATING THERETO

I

The United States Court of Appeals for the Seventh Circuit has misconstrued the effect of the decisions of this Court.

The Court below based its decision principally on certain language in the decisions of the Supreme Court in the cases of *Macauley* v. *Waterman Steamship Corp.*, 327 U. S. 540, 90 L. ed. 839; *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752, 91 L. ed. 1796; *Lichter* v. *United States*, 334 U. S. 742, 92 L. ed. 1694.

The first two of the cited cases were suits for injunction. In the *Waterman* case, the contractor sought a restraining order prohibiting renegotiation proceedings, contending that its contracts were not covered by the Renegotiation Act, and that Section 403(e)(1) of the Act limits The Tax Court's jurisdiction so as not to include questions of coverage. This Court held that a decision as to what are and are not renegotiable contracts is an essential part in determining the amount of a contractor's excessive profits. The Court observed that the legislative history of the Renegotiation Act shows that Congress intended The Tax Court to have exclusive jurisdiction over issues of whether the contracts were subject to the Act.

The Chairman of the Sub-Committee of the Ways and Means Committee, having cognizance of the Renegotiation Bill, explained to the House the function of The Tax Court as follows: (89 Congressional Record at page 9929)

> "* * * We have required the board to make a written decision upon the request of the contractor, stating the facts used as a basis for its decision and the reasons why it decided that the contractor should return so much money. Then the contractor who feels aggrieved by the decision of the board may go to the Tax Court of the United States for a decision de novo, a new hearing based on all the facts.
>
> "The Tax Court was chosen to perform this function for four principal reasons. The first is, that the Tax Court deals with very similar problems under the excess profits tax. The second reason for choosing the Tax Court is the fact that in it judges hold court all over the United States and hence the contractors will not have to come to Washington to be heard by the court. The third is that the use of one forum will bring about a uniformity in the development and application of principles of decision; and the fourth is that a forum had to be chosen upon which Congress could impose the duty of deciding the non-judicial question as to the amount of excessive profits, for the committee is aware that the standards it has prescribed for the determination of excessive profits are too general and flexible to be applied judicially. Under the amendments recommended by the committee these standards do not have to be applied judicially since the obligation to refund excessive profits is made in all cases—as under the original Vinson-Trammel Act—a contract obligation of the contractor."

In the *Aircraft & Diesel* case (331 U. S. 752), the contractor sought a restraining order prohibiting the War Contracts Price Adjustment Board from taking steps requiring customers (prime contractors) of Aircraft & Diesel Equipment Co. (a subcontractor) to withhold payments from the subcontractor of an amount equal to the amount found by the Board to have been excessive on renegotiable contracts of the subcontractor and directing payment of such amounts

to the Treasury. The Court held that the subcontractor had an adequate remedy at law in a suit against its customers (in which the Government would undoubtedly intervene since it was committed to indemnify such persons) and in such suit the subcontractor could raise constitutional issues in respect of the Renegotiation Act and protect any other rights which the subcontractor might have. This Court (331 U. S. 771) expressly reserved decision of the question of finality of Tax Court decisions and observed further that the Court did not decide whether Congress intended to give The Tax Court the last word upon all questions of fact and law, or whether it could do so if that were its purpose. The Court stated further: "Nor need we become involved in an attempt to decide what particular questions it [Congress] might have left, or did leave, for that body's [Tax Court's] final and conclusive disposition."

In the third case, *Lichter* v. *United States*,[1] 334 U. S. 742, the Government brought suit in District courts for collection of the amount of profits determined by the War Contracts Price Adjustment Board to be excessive. The contractor had not filed petitions in The Tax Court for redetermination and the time for so doing had expired. The contractor contended that their contracts were not covered by the Renegotiation Acts and that excessive profits were not made within the meaning of the Act. Constitutional issues were also raised. The Supreme Court again held that the procedure provided by the Act for petition to The Tax Court was the one and only procedure to secure a redetermination of the *amount* of excessive profits. At the same time the Court stated: (334 U. S. 742, 774) "We find no reason for not reaching here the constitutionality of the Act." This Court then decided the constitutional issues raised and de-

[1] The *Lichter* case from the 6th Circuit (160 F. (2d) 329) was consolidated in the Supreme Court with *Pownall* v. *United States* from the 9th Circuit (159 F. (2d) 73), and *Alexander Wool Combing Company* v. *United States* from the 1st Circuit (160 F. (2d) 103).

termined legal issues in respect of the limitations of the Act; e.g., (334 U. S. 742, 788) "Congress limited the Renegotiation Act to future contracts and to contracts already existing but pursuant to which final payments had not been made prior to the date of enactment of the original Act. These included * * * subcontracts such as those here involved."

The foregoing makes it clear that all that this court decided or had to decide in the above-cited cases is that "nonjudicial questions as to the amount of excessive profits" are reserved for decision of The Tax Court on a timely petition thereto and that questions of law or fact which must be decided in determining the amount of excessive profits are within the exclusive province of The Tax Court. Nowhere did this Court hold or purport to hold that a legal question which has no relation to the amount of excessive profits, but is strictly a question of law, the answer to which determines the constitutional or statutory rights of a contractor, is within the exclusive jurisdiction of The Tax Court. In the *Lichter* case, constitutional questions and questions of law other than those questions relating to determinations of amount were decided.

While finding that: (R. 74)

> "The facts on which the defendant bases its claim to a discharge of liability are not disputed. It, therefore, becomes a question of the proper interpretation of the Act, a question of law, as to whether the defendant's liability under the Act has been discharged."

the Court below, nevertheless, held that this petitioner was precluded from asserting in the District Court as a matter of defense a statutory right under Section 403(c)(3) of the Renegotiation Act of 1943 that its liability had been discharged.

The decision of the Court below is in conflict with the basic tenets of this Court in the *Lichter* case.

II

The decision of the United States Court of Appeals for the Seventh Circuit in the case at bar is in conflict with decisions of other Courts of Appeal.

The precise question presented to the Court of Appeals for the Seventh Circuit in the instant case as to whether or not petitioner was precluded by the Renegotiation Act from raising in the District Court an affirmative defense of discharge of liability because of its failure to file a petition in The Tax Court for a redetermination of the amount of excessive profits was squarely presented to the Court of Appeals for the Second Circuit in the case of *United States* v. *Wissahickon Tool Works*, (2nd Cir. 1952) 200 F. (2d) 936. The form in which that question was presented will be seen from the Government's brief reprinted in the petition for rehearing filed in this case. (R. 86-89). In the *Wissahickon* case, the Second Circuit held (citing *Lichter* v. *U. S.*, 334 U. S. 742) that the contractors' objections to the action of the Boards involving determinations of amount of liability fell squarely within the orbit of exclusive Tax Court review, but the Court rejected the Government's contention that the contractor was barred from raising the defense in the District Court that its liability had been discharged under the limitations provisions of Section 403(c)(3) of the Act. The Court of Appeals for the Second Circuit thereupon affirmed the decision of the District Court (84 F. Supp. 896, 99 F. Supp. 331) and held that the defense of discharge of liability under Section 403(c)(3) of the Renegotiation Act was properly raised as an affirmative defense in the District Court in a collection action brought by the Government despite the failure to file a petition in The Tax Court.[1]

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[1] In accord, though the issue was not so sharply crystallized, is *United States* v. *Hickey*, 70 F. Supp. 13, aff'd (5th Cir. 1948) 168 F. (2d) 752. Contra: *United States* v. *Scandia Mfg. Co.* (D.C.D. N.J. 1952), 101 F. Supp. 583.

Thus, the decision of the Court of Appeals for the Seventh Circuit on this issue is squarely in conflict with that of the Court of Appeals for the Second Circuit in the *Wissahickon* case.

III

The construction of the Court of Appeals for the Seventh Circuit of Section 403(c)(1) of the Renegotiation Act of 1943 invalidates *pro tanto* that Section of the statute as a provision contrary to the Constitution.

A construction of Section 403(c)(1) of the Renegotiation Act of 1943 so as to prohibit a court of law from considering a defense of complete legal discharge invalidates *pro tanto* that section of the statute as an unconstitutional infringement of the judicial power vested in the courts of the United States by Article III, Section 1, and Section 2, Clause 1, of the Constitution.

Moreover, the effect of the lower Court's construction of Section 403(c)(1) is to require a strictly legal defense to be exhausted by an administrative procedure at the risk of being shut off from raising it in an enforcement action in a court of law wherein enforcement is sought. So construed, Section 403(c)(1) would violate the Fifth Amendment to the Constitution as a deprivation of property—viz., full legal discharge of liability—without due process of law. The constitutional issues are not more fully developed herein as it seems patent that the lower Court has misconstrued the effect of the decisions of this Court.

The question presented herein continues to be important because the later Renegotiation Acts [1] contain substantially the same basic provisions above quoted.

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[1] Renegotiation Act of 1951, 65 Stat. 7, C. 15 (50 App. U.S.C.A. Sections 1211-1233).

It is respectfully submitted that this petition for writ of certiorari should be granted.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 573

EDWARD VALVES, INC., *Petitioner*

v.

THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Indiana (R. 52-58) is reported at 101 F. Supp. 559. The opinion of the United States Court of Appeals for the Seventh Circuit (R. 71-78) is reported at 207 F. 2d 329.

JURISDICTION

The judgment of the Court of Appeals was entered on October 7, 1953 (R. 80). A timely petition for rehearing (R. 81-89) was denied on November 6, 1953 (R. 91). The petition for a writ of certiorari was filed on February 3, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner may raise, in a district court proceeding by the Government under the Renegotiation Act to enforce an administrative determination of excessive profits, the defense of lack of timely commencement of renegotiation, although petitioner failed to file a petition in the Tax Court for redetermination of its excessive profits.

STATUTE INVOLVED

The pertinent provisions of the Renegotiation Act, as amended, 58 Stat. 78, 50 U.S.C. App. 1191, are set forth in the Appendix, *infra,* pp. 15-18.

STATEMENT

The United States brought this action in the district court under Section 403(c) (2) of the Renegotiation Act (Appendix, *infra,* p. 16) to recover from the petitioner amounts determined by the Maritime Commission Price Adjustment Board and by the War Contracts Price Adjustment Board to be excessive profits for the fiscal

years ending December 31, 1942, 1943, 1944, and 1945 (R. 4-25). The complaint was in four counts, covering petitioner's contracts in each of the four years respectively. The question presented in this case pertains to the second count only, dealing with the year ended December 31, 1943. That count alleged that upon due commencement of renegotiation proceedings the Acting Chairman of the Maritime Commission made a unilateral determination, pursuant to the statute, that petitioner's excessive profits for the year 1943, under its contracts with the Commission, amounted to $1,286,000 (R. 6-7); that notice of this determination was mailed to the petitioner on March 19, 1946 (R. 7, 15-16); that on July 8, 1946, the War Contracts Price Adjustment Board notified the petitioner that the Board had adopted this determination (R. 7, 16-17); and that after allowance for tax credits of $1,028,800 petitioner was liable for the balance of $257,200, with interest (R. 7-8).

Petitioner in its answer (R. 25-39) alleged that notice of the commencement of renegotiation proceedings for the year ended December 31, 1943, was not received by it until May 5, 1945, more than one year after the end of the fiscal year in question, and that under Section 403(c)(3) of the Act (Appendix, *infra*, pp. 17-18), the failure to commence renegotiation within one year discharged petitioner's liability under the Act (R. 27-28). The petitioner attached to its answer a copy of the

notice of commencement of renegotiation, dated May 5, 1945 (R. 34). The petitioner also alleged, treating the Board's order of July 8, 1946, as the order determining the amount of excessive profits, that the order was not entered within one year of the commencement of renegotiation, as required by Section 403(c)(3) (R. 28).

Both parties moved for summary judgment (R. 40, 41). The petitioner had never availed itself of its statutory right to file with the Tax Court, within 90 days of the Board's order, a petition for redetermination of the excessive profits determined by the Price Adjustment Board (R. 28-29, 72); and the Government urged that, in the absence of a petition in the Tax Court for redetermination, the determination of the Board was, under Section 403(c)(1), "final and conclusive" (Appendix, *infra,* p. 15). The petitioner urged that a failure of the Board to make a timely commencement or a timely completion of renegotiation proceedings discharged the petitioner's liability, and that this defense, involving a question of law and affecting the petitioner's "legal liability," could be raised in the district court in an action to recover the amount determined by the Board to be excessive profits. The petitioner argued that a contrary construction of the Act's provision for finality of orders of the Board (if Tax Court redetermination was not sought) would deprive the petitioner of constitutional rights.

The district court granted the Government's motion for summary judgment and denied the petitioner's motion (R. 52-58). The court held that Section 403(e)(1) of the Act (Appendix, *infra,* p. 18) makes the Tax Court remedy the exclusive procedure for challenging determinations of the Board and that this was as true of a challenge based upon alleged failure to commence or to complete renegotiation within the time limited as of challenges raising questions of the coverage of the statute or of the amount of profits—issues of the latter type having been disposed of adversely to petitioner's view by this Court's decision in *Lichter* v. *United States,* 334 U.S. 742 (R. 55-56). While the Court recognized that broad questions of constitutionality of the Renegotiation Act on its face might be raised in a proceeding to enforce the Board's order (cf. *Lichter* v. *United States,* 334 U.S. 742), and that the question sought to be raised by the petitioner might be presented in a judicial proceeding to review a determination of the Tax Court, it refused to accept the petitioner's contention that the Tax Court procedure could be bypassed on nonconstitutional questions of law (R. 56-57).

The court of appeals affirmed (R. 71-78). It held that although the questions raised by the petitioner were questions of law they could have been presented to the Tax Court and that failure to pursue the Tax Court remedy barred the peti-

tioner from raising the questions in a proceeding to enforce the Board's order. The court relied on this Court's decisions in *Macauley* v. *Waterman Steamship Corp.*, 327 U.S. 540; *Aircraft & Diesel Corp.* v. *Hirsch,* 331 U.S. 752; and *Lichter* v. *United States,* 334 U.S. 742 (R. 73-77).

ARGUMENT

The statutory issue raised by the petitioner is too narrow to warrant review by this Court; moreover, its disposition by the court below is clearly correct and conforms to the principles plainly laid out by the prior decisions of this Court. The asserted conflict on this issue between the decision below and that of the Court of Appeals for the Second Circuit does not exist. And the constitutional questions urged by the petitioner are insubstantial.

1. Section 403(e)(1) of the Renegotiation Act (Appendix, *infra,* p. 18) provides that a contractor aggrieved by an order determining its excessive profits may, within 90 days of the order, petition the Tax Court for a redetermination, and that the Tax Court "shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits." Section 403(c)(1) (Appendix, *infra,* p. 15) provides that in the absence of such a petition to the Tax Court the order of the Price Adjustment Board "shall be final and conclusive and shall not be subject to

review or redetermination by any court or other agency." It is settled by the decisions of this Court that, while the finality provision last quoted does not preclude a contractor from questioning the Act's constitutionality in a district court action by the Government to recover the amounts determined by the Board to be excessive profits (see *Lichter* v. *United States*, 334 U.S. 742, 774), on non-constitutional questions—including questions of coverage, amount of excessive profits, and the like—the Tax Court procedure must be invoked and exhausted before any judicial review may be sought. *Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540; *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U.S. 752; *Lichter* v. *United States*, 334 U.S. 742.[1]

The petitioner concedes (Pet. 7, 9-10) that under these decisions questions of coverage (that is,

[1] It is unnecessary in this case, as in the cases cited, to decide (a) whether a redetermination by the Tax Court in accordance with the statutory procedure is reviewable either on direct petition to the courts of appeals for review or in some form of collateral attack, or (b) if the Tax Court's order is judicially reviewable, what is the extent and scope of the review. See *Lichter* v. *United States*, 334 U.S. 742, 791; *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U.S. 752, 771. The Court of Appeals for the District of Columbia Circuit has held that a question of timely commencement of renegotiation, such as that here involved, goes to the jurisdiction of the Tax Court and is therefore reviewable by the courts of appeals under the District of Columbia Circuit's view that jurisdictional issues are subject to full review on appeal from the Tax Court. *Blanchard Machine Co.* v. *RFC*, 177 F. 2d 727 (C.A.D.C.) certiorari denied, 339 U.S. 912.

whether a given contract is renegotiable within the meaning of the Act) and "non-judicial" questions of the amount of excessive profits may not be raised in a district court enforcement proceeding, but contends that this Court's opinions may not be read as applying the statutory provision for exclusiveness of the Tax Court remedy to questions which neither pertain to the amount of excessive profits nor involve issues of fact. The narrow issue raised by the petition is whether the rule laid down by this Court's opinions is so limited.

It is clear, from a mere reading of the Court's opinions, that the rule of finality is not so restricted and that the court below correctly held that questions of timely commencement or timely completion of renegotiation may not be raised in the district courts. Petitioner's argument that these questions were properly raised in the district court because they are issues of law is fully answered by the Court's statement in *Macauley* v. *Waterman S. S. Corp.*, 327 U.S. 540, 544, that:

> Congress intended the Tax Court to have exclusive jurisdiction to decide questions of *fact and law,* which latter includes the issue raised here of whether the contracts in question are subject to the Act. [Emphasis added.]

And it is equally plain that the exclusiveness of the Tax Court remedy is not limited to questions of the amount of excessive profits. In *Waterman,*

the Court, holding that the Tax Court was the exclusive forum for raising the issue whether the United States was a party to the contracts in question, expressly rejected the contention that the Tax Court remedy was available only on questions of the amount of excessive profits (327 U.S. at 544). And in *Lichter* v. *United States,* 334 U.S. 742, the Court held (334 U.S. at 754):

> By reason of the finality thus attached to the determinations made as to excessive profits in these cases, we do not pass upon the issues attempted to be raised here as to the coverage of the Act, the amount of the profits, *or other matters which the petitioners might have presented to the Tax Court but did not.* [Emphasis added.]

The questions of timely commencement and timely completion of renegotiation entered this case immediately upon issuance of the Board's order determining the petitioner's excessive profits. Accordingly, they "might have [been] presented to the Tax Court" (334 U.S. at 754), and all the reasons relied on by this Court in the *Lichter* and *Waterman* cases as well as in *Aircraft & Diesel Corp.* v. *Hirsch,* 331 U.S. 752) for requiring exhaustion of the administrative remedy apply with equal force in this case. A Tax Court decision favorable to the petitioners would have

eliminated the need for the courts to pass upon the questions raised.

The type of issues involved here are fully comparable to those required in the earlier cases to be presented to the Tax Court. The Court said in the *Lichter* case (334 U.S. at 792):

> We uphold the decisions below and the contentions of the Government to the effect that the statutory provision thus made for a petition to the Tax Court was not, in any case before us, an optional or alternative procedure. It provided the one and only procedure to secure a redetermination of the excessive profits which had been determined to exist by the orders of the respective Secretaries or of the Board in the cases before us. Failure of the respective petitioners to exhaust that procedure has left them with no right to present here issues such as those as to coverage and the amount of profits which might have been presented there. Accordingly, there is excluded from our consideration in this proceeding the contention in the *Lichter* case that the petitioners' subcontracts were exempt from renegotiation on the ground that they were subcontracts under prime contracts with a Department of the Government and had been awarded to them as the result of competitive bidding for the construction of buildings and facilities. There is excluded

> also, for example, the contention in the *Pownall* case that petitioners' contracts which were for amounts under $100,000 each were not subject to renegotiation. Likewise, in the *Alexander* case, there is excluded the petitioner's contention that it had not made excessive profits within the meaning of the statute and that its contracts for processing wool were not "subcontracts" within the meaning of the Original Renegotiation Act.

The questions "such as coverage" there held to be exclusively within the province of the Tax Court to review were far broader than mere "non-judicial" questions as to amount of profits. The issues of timely commencement and timely completion of renegotiation involved here are no more basic than the issues which the Court refused to consider in the previous cases, and accordingly are no more deserving of review outside the statutory channels. Redetermination by the Tax Court is provided to reconsider whether the contractor received "any" excessive profits, and questions of timely commencement and timely completion of renegotiation, like the questions discussed in *Lichter*, affect the question whether there were "any" renegotiable profits within the meaning of the statute. All such issues are for the Tax Court.

2. The conflict purportedly found by the petitioner between the decision below and that of the

Court of Appeals for the Second Circuit in *United States* v. *Wissahickon Tool Works,* 200 F. 2d 936 (C.A. 2) is nonexistent. The latter case, like the present, was an action by the Government to recover the amount of profit determined by the War Contracts Price Adjustment Board to be excessive; and the defendants, not having exhausted the Tax Court remedy, sought to raise as a defense the issue of whether renegotiation had been timely commenced. The district court granted summary judgment for the Government, and on appeal the defendants again raised the issue of timely commencement. The Government urged, as the petition for rehearing below plainly shows (R. 86), alternative grounds for affirmance: —(1) that the renegotiation had in fact been timely commenced and (2), as in this case, that in any event failure to exhaust the Tax Court remedy barred the defendant from raising the issue. The Court of Appeals for the Second Circuit held that on the face of the pleadings it was plain that the commencement of renegotiation had in fact been timely and affirmed on that ground. The court therefore found no need to advert to the second ground of whether the question of timely commencement could properly be raised in the district court. On this issue, the court — far from upholding the petitioner's view—made no comment whatever.

3. The petitioner's contentions (Pet. 12) that the construction given the statute by the court below, and clearly indicated by the prior decisions of this Court, deprives the petitioner of constitutional rights are wholly unfounded. The power of Congress to require exhaustion of the Tax Court remedy as a prerequisite to obtaining judicial review of a question was settled by the *Lichter* case (see 334 U.S. at 791).[2] Indeed, it is clear that there is no constitutional bar to the power of Congress to place even questions of constitutionality, as well as questions of coverage and of the timeliness of renegotiation proceedings, within the exclusive original jurisdiction of the Tax Court. *Lockerty* v. *Phillips,* 319 U.S. 182; *Yakus* v. *United States,* 321 U.S. 414, 444.[3]

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[2] It is, of course, unnecessary to consider questions of the constitutionality of refusing all review after exhaustion of the Tax Court remedy. See fn. 1, *supra*, p. 7.

[3] The cases cited squarely dispose of the contention that Section 403(c) (1) (*infra*. p. 15) denies the petitioner due process. The petitioner's reliance on Article III of the Constitution (Pet. 12) is likewise unfounded. It is well settled that it is no legislative invasion of the power of the judiciary to require defenses to be raised in the first instance in an administrative tribunal or a specified court. *Lockerty* v. *Phillips,* 319 U.S. 182; cf. *Murray's Lessee* v. *Hoboken Land & Improvement Co.,* 18 How. 272.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1954.

APPENDIX

The pertinent provisions of the Renegotiation Act, as amended by Title VII of the Revenue Act of 1943, 58 Stat. 78, 50 U.S.C. App. 1191, read as follows:

> SEC. 403(c)(1)—Whenever, in the opinion of the Board, the amounts received or accrued under contracts with the Departments and subcontracts may reflect excessive profits, the Board shall give to the contractor or subcontractor, as the case may be, reasonable notice of the time and place of a conference to be held with respect thereto. The mailing of such notice by registered mail to the contractor or subcontractor shall constitute the commencement of the renegotiation proceeding. * * * If the Board does not make an agreement with respect to the elimination of excessive profits received or accrued, it shall issue and enter an order determining the amount, if any, of such excessive profits, and forthwith give notice thereof by registered mail to the contractor or subcontractor. In the absence of the filing of a petition with The Tax Court of the United States under the provisions of and within the time limit prescribed in subsection (e)(1), such order shall be final and conclusive and shall not be subject to review or redetermination by any court or other agency. * * *

SEC. 403(c)(2)—Upon the making of an agreement, or the entry of an order, under paragraph (1) by the Board, or the entry of an order under subsection (e) by the Tax Court of the United States, determining excessive profits, the Board shall forthwith authorize and direct the Secretaries or any of them to eliminate such excessive profits (A) by reductions in the amounts otherwise payable to the contractor under contracts with the Departments, or by other revision of their terms; or (B) by withholding from amounts otherwise due to the contractor any amount of such excessive profits; or (C) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to a subcontractor, any amount of such excessive profits of such subcontractor; or (D) by recovery from the contractor, through repayment, credit, or suit any amount of such excessive profits actually paid to him; or (E) by any combination of these methods, as is deemed desirable. Actions on behalf of the United States may be brought in the appropriate courts of the United States to recover from the contractor any amount of such excessive profits actually paid to him and not withheld or eliminated by some other method under this subsection. * * *

SEC. 403(c)(3)—No proceeding to determine the amount of excessive profits shall be commenced more than one year after the close of the fiscal year in which such excessive profits were received or accrued, or more than one year after the statement required under paragraph (5) is filed with the Board, whichever is the later, and if such proceeding is not so commenced, then upon the expiration of one year following the close of such fiscal year, or one year following the date upon which such statement is so filed, whichever is the later, all liabilities of the contractor or subcontractor for excessive profits received or accrued during such fiscal year shall thereupon be discharged. If an agreement or order determining the amount of excessive profits is not made within one year following the commencement of the renegotiation proceeding, then upon the expiration of such one year all liabilities of the contractor or subcontractor for excessive profits with respect to which such proceeding was commenced shall thereupon be discharged, except that (A) if an order is made within such one year by the Secretary (or an officer or agency designated by the Secretary) pursuant to a delegation of authority under subsection (d)(4), such one-year limitation shall not apply to review of such order by the Board,

and (B) such one-year period may be extended by mutual agreement.

* * * * * * *

SEC. 403(e)(1)—Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c)(1), file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 573

EDWARD VALVES, INC., *Petitioner,*

v.

THE UNITED STATES OF AMERICA.

REPLY BRIEF FOR EDWARD VALVES, INC., PETITIONER.

CHARLES D. HAMEL,
JOHN ENRIETTO,
Counsel for Petitioner.

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Of Counsel.

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Omissions and errors in the Government's brief in opposition to the petition in this cause require correction for a clear understanding of the issue presented. The factual error in respondent's brief (Resp. Br. p. 3) that there was a question involved in the pleadings in respect of commencement of renegotiation proceedings (as to which no issue has ever been raised) serves to befog the real issue presented. Respondent's statement of the question presented (Resp. Br. p. 2) contains the same error and further does not clearly state the real issue.

There is one and only one issue presented in this Court—as in the courts below. Petitioner entered a defense of law, in a court of law wherein the Government brought its action, that, since renegotiation proceedings were not completed within one year of commencement, any liability for alleged excessive profits was *discharged* by the terms of the Renegotiation Act itself. (Section 403(c)(3)) The question presented here is whether a defense of law—*discharge of liability* under Section 403(c)(3))—may be entered in the court of law wherein the alleged liability is asserted.

Respondent argues that a pure question of law can be considered only in the Tax Court by way of a petition thereto for a redetermination of the amount of excessive profits. Thus, under respondent's view, the petitioner was required to initiate a cumbersome, expensive Tax Court proceeding in order to present any and all issues—regardless of whether the sole issue be a defense in law, regardless of whether the issue goes to the validity of an order of the Administrative Board and the power of the Board to issue the order, regardless of whether the issue has anything to do with the determination of amount of excessive profits, and regardless of whether a Tax Court proceeding would amount to a circuitous and dilatory route to the courts and in which proceeding the Tax Court could add nothing. The Tax Court proceeding is a *de novo* proceeding to determine the amount of excessive profits and not a review of the determination of the War Contracts Price Adjustment Board. (Renegotiation Act, Section 403(e)(1)).

Respondent's disputation (Resp. Br. pp. 11-12) to the effect that the Court of Appeals for the Second Circuit in the case of *United States* v. *Wissahickon Tool Works,* 200 F. (2d) 936, decided the case on the merits as an alternative to a decision on jurisdictional grounds is a confused and fallacious argument. A decision on the merits depends on and follows a decision on jurisdiction—not alternatively. The decisions of the Court of Appeals for the Second Circuit in *Wissahickon* and of the Court of Appeals for the Seventh Circuit on the issue presented are squarely in conflict.

It is respectfully submitted that the petition for writ of certiorari should be granted.

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